Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1310 OF 1997
ABDUL MALIK ISHAK J
18 FEBRUARY 2004

Civil Procedure — Action — Consolidation of suits — Application by defendants to consolidate two suits — Whether suits could be consolidated — Rules of the High Court 1980 O 4

Civil Procedure — Estoppel — By conduct — Defendant applied to consolidate two suits — Plaintiff had no objection to defendants' application initially — Whether plaintiff could object to defendants' application now

This was an application by the defendants in encl 43 that the D4 suit be consolidated with the D5 suit bearing number D5–22–396–2002 and thereafter transferred to the D5 court pursuant to O 4 of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court. The defendants submitted that there were common questions of law and fact in the suits, that the rights to relief claimed in both suits arose from the same transactions or series of transactions, it would be in the interests of justice to avoid conflicting decisions on the same issues in the suits and it would save time and costs. The plaintiff argued that both suits were at different stages, the defendants' application was an abuse of the process of court and that the application was a tactical move to complicate the issues. Initially the plaintiff had agreed to the defendants' application for the consolidation of the suits.

Held, allowing the prayers sought in encl 43:

(1) The plaintiff had initially agreed to consolidate the D4 suit with the D5 suit and therefore should be estopped from contesting the defendants' application in encl 43. The doctrine of estoppel by conduct or what is also known as estoppel by matters in pais would apply in favour of the defendants. It must be emphasised that in agreeing to the defendants' request for consolidation, the plaintiff in the D4 suit has not imposed nor set any time limit for the application for consolidation to be filed. It was highly unconscionable and even bordered on being unethical for the plaintiff in the D4 suit to go back on its agreement with the defendants especially when there was no prejudice whatsoever to the plaintiff in the D4 suit (see para 15).

(2) The appeal to the judge in chambers in the D4 suit that was still pending was in every sense of the word a subsisting suit and it was well within the defendants' legal right in the D4 suit to file the present application for consolidation in encl 43 (see para 17).

(3) This suit was consolidated with the D5 suit and transferred to the D5 court (see para 18).

[**Bahasa Malaysia summary**

Ini adalah permohonan oleh defendan-defendan di dalam kandungan 43 bahawa guaman D4 disatukan dengan guaman D5 bernombor D5–22–396–2002 dan selepas itu dipindahkan ke mahkamah guaman D5 mengikut A 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan di bawah bidang kuasa sedia ada mahkamah. Defendan-defendan berkata bahawa terdapat persoalan-persoalan undang-undang dan fakta di dalam gauman-guaman itu, hak-hak relif-relif yang dituntut di dalam kedua-dua guaman itu berbangkit daripada transaksi-transaksi yang sama atau siri transaksi, ia adalah di dalam kepentingan keadilan untuk mengelak keputusan-keputusan yang bercanggah pada isu-isu yang sama di dalam guaman-guaman itu dan ia akan menjimatkan masa dan kos. Plaintif berkata bahawa kedua-dua guaman itu berada di tahap yang berlainan, permohonan defendan-defendan adalah penyalahgunaan proses mahkamah dan permohonan itu adalah satu taktik untuk menyulitkan isu-isu. Pada permulaannya, plaintif telah bersetuju kepada permohonan defendan-defendan untuk penyatuan guaman-guaman itu.

Diputuskan, membenarkan permohonan-permohonan di dalam kandungan 43:

(1) Plaintiff pada permulaannya telah bersetuju unutk menyatukan guaman D4 dengan guaman D5 dan plaintif patut diestop daripada mempertikaikan permohonan defendan-defendan di dalam kandungan 43. Doktrin estopel melalui kelakuan atau dikenali sebagai estopel oleh perkara in pais akan memihak kepada defendan-defendan. Ia mesti ditekankan bahawa dengan mempersetujui permintaan defendan-defendan untuk penyatuan, plaintif di dalam guaman D4 tidak mengenakan atau menentukan had masa untuk permohonan penyatuan itu difailkan. Ia adalah tidak berpatutan dan hampir-hampir tidak beretika bagi plaintif untuk melanggar persetujuannya di dalam guaman D4 lebih-lebih lagi apabila tiada perjudis kepada plaintif di dalam guaman D4 (lihat perenggan 15).

(2) Rayuan kepada hakim dalam kamar masih belum diselesaikan dan merupakan guaman yang masih berterusan dan defendan-defendan mempunyai hak undang-undang untuk untuk memfailkan permohonan ini di dalam guaman D4 untuk penyatuan di dalam kandungan 43 (lihat perenggan 17).

(3) Guaman-guaman ini disatukan dengan guaman D5 dan dipindahkan ke mahkamah guaman D5 (lihat perenggan 18)].

Notes

For cases on consolidation of actions, see 2(3) *Mallal's Digest* (4th Ed 2001 Reissue) paras 86-90.

For cases on estoppel by conduct, see 2(3) *Mallal's Digest* (4th Ed 2001 Reissue) paras 2177-2180.

For consolidation of proceedings, see 1 *Halsbury's Laws of Malaysia*, para [10.1-0.65].

Cases referred to

Arab Monetary Fund v Hashim (No 4) [1992] 4 All ER 860 (refd)
Carr v London & North Western Rly Co (1875) LR 10 CP 307 (refd)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244 (refd)
Daws v Daily Sketch & Sunday Graphic Ltd & Anor [1960] 1 WLR 126, [1960] 1 All ER 397 (refd)
Del E Webb International Hotel Co v Hotel Merlin (Penang) Sdn Bhd [1973] 1 MLJ 31 (refd)
Freeman v Cooke (1848) 2 Exch 654 (refd)
Hopgood v Brown [1955] 1 All ER 550 (refd)
Horwood v British Statesman Publishing Co Ltd [1929] WN 38 (refd)
Lewis & Anor v Daily Telegraph Ltd & Anor (No 2) [1964] 2 QB 601 (refd)
Martin v Martin & Co [1897] 1 QB 429 (refd)
Payne v British Time Recorder Co Ltd and W.W Curtis Ltd [1921] 2 KB 1 (refd)
Pickard v Sears (1837) 6 Ad & El 469 (refd)
Smith & Anor v Blandford Gee Cementation Co Ltd [1970] 3 All ER 154 (refd)

Legislation referred to

Courts of Judicature Act 1964
Rules of the High Court O 4, 15 r 4

CP Lee (Azman Davidson & Co) for the plaintiff in the D4 suit.
Govin Sreedharan (Choong & Co) for the defendants in the D4 suit.

Abdul Malik Ishak J:

Introduction

[1] This is an application by the defendants in encl 43 to have this suit — the D4 suit consolidated with the D5 suit bearing number D5–22–396–2002 and thereafter transferred to the D5 court pursuant to O 4 of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of this court.

[2] In encl 43, the defendants have prayed for, inter alia, the following orders:

(i) that this suit (referring to the 'D4 suit') be consolidated with the D5 suit (referring to the suit bearing number D5–22–396–2002) and thereafter be carried on concurrently;

(ii) that the title to the D5 suit (referring to the suit bearing number D5–22–396–2002) be amended by adding it to the title of the D4 suit; and

(iii) that the costs of and incidental to this application be costs in the cause.

What is the purpose of consolidation?

[3] It is to save time and costs and is usually ordered when there appears to the court that there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions so as 'to render it desirable that the whole should be disposed of at the same time' (*Payne v British Time Recorder Co Ltd and W.W Curtis Ltd* [1921] 2 KB 1; *Horwood v British Statesman Publishing Co Ltd* [1929] WN 38; and *Daws v Daily Sketch & Sunday Graphic Ltd & Anor* [1960] 1 WLR 126, [1960] 1 All ER 397, CA). It seems that saving time and costs is of the most importance (*Del E Webb International Hotel Co v Hotel Merlin (Penang) Sdn Bhd* [1973] 1 MLJ 31). Consolidation may be ordered by the court where the parties in the actions are the same or different persons. The court will not hesitate to consolidate where the plaintiffs are the same and the defendants are also the same or even where the plaintiffs or the defendants or all of them are different (*Horwood v British Statesman Publishing Co Ltd*). Even actions against the same defendant, for instance, one in regard to the damages sustained before or at the date of the writ, and the other in regard to the damages sustained subsequently and thereafter, may be ordered to be consolidated (*Martin v Martin & Co* [1897] 1 QB 429). It is pertinent to note that no order for consolidation will ever be made by the court unless all the parties affected have been heard (*Daws v Daily Sketch & Sunday Graphic Ltd & Anor*). In a situation where embarrassment at the trial may be caused, consolidation may be refused. An embarrassment may occur where the actions are filed by different plaintiffs based on the same libel and the defences are differently taken by the defendants. Of pertinence would be this. What has been consolidated may be deconsolidated as reflected in the case of *Lewis & Anor v Daily Telegraph Ltd & Anor (No 2)* [1964] 2 QB 601, CA.

[4] So where the plaintiffs in the various actions are unable to agree on a common representation by a single firm of solicitors, consolidation may be refused (*Lewis & Anor v Daily Telegraph Ltd & Anor* at p 623). Everything would be dependent on the court. The court is given a wide discretion nay untrammelled in its effect to make an order of consolidation even though such an order may give the applicant an advantage in regard to the issue of the limitation period (*Arab Monetary Fund v Hashim (No 4)* [1992] 4 All ER 860 at 864).

[5] Apart from O 4 of the RHC, consolidation may also be made under O 15 r 4 of the RHC where the parties could be joined thereunder (*Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244, FC).

Transfer of proceedings

[6] Reference should be made to the Courts of Judicature Act 1964 (Act 91) especially to the Schedule thereto and it must be read with O 4 of the RHC as well as with the inherent jurisdiction of this court. Within the realm of the additional powers of the High Court as envisaged in the Schedule to

the Courts of Judicature Act 1964 (Act 91), the High Court is certainly empowered:

> ... to transfer any proceedings to any other court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

[7] I have said in other cases that the inherent jurisdiction of this court stems from the fact that it is a court of law. Being a court of law, this court may exercise its inherent jurisdiction to ensure a smooth and orderly administration of justice. Being part of the machinery of justice, the inherent jurisdiction of this court may be invoked for the benefit of all litigants. It is a potent power that no one can deny.

To the facts

[8] The plaintiff's claims in this suit — referring to the D4 suit, as well as in the D5 suit are both based on a subscription agreement dated 13 March 1995, a guarantee and indemnity agreement dated 13 March 1995 by the first defendant ('the first guarantee') and a guarantee agreement dated 27 April 1995 by the second defendant ('the second guarantee').The plaintiff's claim in the D4 suit is for the alleged shortfall in the profit after tax of Astounding Technologies (Malaysia) Sdn Bhd for the first guarantee period from 1 April 1995 to 31 March 1997 pursuant to and under the first guarantee and the second guarantee. While the plaintiff's claim in the D5 suit is for the alleged shortfall in the profit after tax for the second guarantee period from 1 April 1995 to 31 March 2001 also pursuant to and under the same first guarantee and the second guarantee.

[9] The defendants' defences in the D4 suit and the D5 suit are essentially the same. It is this. That the plaintiff's claim is premature as there has been no audit done on the accounts of Astounding Technologies (Malaysia) Sdn Bhd for the relevant period to determine its actual financial position and whether there is indeed any shortfall in the profit after tax for the first guarantee period and the second guarantee period.

[10] It must be emphasised that the plaintiff and the defendants in the D4 suit and in the D5 suit are the same parties.

Reasons for the consolidation

[11] The defendants' stand on this issue may be summarised in this way:

(i) that there are common questions of law and facts that arise in the D4 suit and in the D5 suit;

(ii) that the rights to relief claimed in the D4 suit and the D5 suit are in respect of or arise out of the same transaction or series of transactions;

(iii) that since there are common questions of law and facts in the D4 suit and the D5 suit, it would be in the interests of justice and to avoid conflicting decisions on the same issues that it would be ideal to have the D4 suit and the D5 suit to be tried concurrently; and

(iv) that substantial time and costs would be saved by having the D4 suit and the D5 suit to be tried concurrently since the plaintiff in both the suits and the defendants in both the suits would be calling the same witnesses and advancing the same legal arguments.

The objections advanced by the plaintiff in the D4 suit

[12] Initially the plaintiff in the D4 suit had no objections to the defendants' application to consolidate the D4 suit with the D5 suit and this is reflected in its solicitors letter dated 10 January 2003 to the defendants' solicitors as seen in exh 'LTL-4' of encl 44.

[13] Now, the plaintiff in the D4 suit objects to the very idea of consolidation and advances the following reasons:

(i) The stage at which the D4 suit is at is very different from the D5 suit. In the D4 suit, there is no application for summary judgment filed. At the time when the defendants filed the application to strike out the D4 suit, the D4 suit was ready for trial and that the following documents had been filed:

(a) the order for summons for directions;

(b) the plaintiff's list of documents and the affidavit verifying the documents;

(c) the defendants' list of documents and the affidavit verifying the documents;

(d) the request to set down the action for trial;

(e) the notification of setting down the action for trial;

(f) the bundle of pleadings;

(g) the issues to be tried;

(h) the agreed facts; and

(i) the non-agreed facts.

(ii) It is said that the D4 suit and the D5 suit are now at very different stages of progress. It is said that it is not practical for both these two suits to be consolidated, and heard at the same time. It is also said that it is not practical for the D4 suit to be transferred to the D5 court and then consolidation takes effect with the D5 suit. The defendants had applied to strike out both the suits in the respective courts and the D4 suit had been struck off by the learned senior assistant registrar and is currently pending appeal to the judge in chambers in the D4 court. In regard to the D5 suit, the learned senior assistant registrar had dismissed the application to strike out and the same is pending appeal to the judge in chambers in the D5 court.

(iii) That since the D4 suit had been struck off by the learned senior assistant registrar, there is no suit in existence at the current moment before the D4 court and so it cannot be consolidated with the D5 court.

[14] Briefly put, the plaintiff in the D4 suit is saying that both the suits have progressed in different directions and are at such different stages that it is not convenient now for the two suits to be consolidated. It is submitted that consolidation would likely result in complications during the case management and that it would cause delay in both these proceedings and additional costs would also be incurred as a result of the delay and the complications thereto. The plaintiff in the D4 suit is also saying that the application of the defendants in encl 43 is an abuse of the process of this court. It is said that the timing of the application is bad and it is not done for a bona fide reason but rather a tactical move to complicate the issues for the summary application in the D5 suit and at the same time to influence the learned judge in the D5 court with the learned senior assistant registrar's decision in the D4 suit in regard to the striking out application.

Decision of the court

[15] It must be recalled that the plaintiff had initially agreed to consolidate the D4 suit with the D5 suit and it is my judgment that the plaintiff should be estopped from contesting the defendants' application in encl 43. The doctrine of estoppel by conduct or what is also known as estoppel by matters in pais would apply in favour of the defendants. It is now trite law that a person who by his words or conduct wilfully causes another to believe in the existence of a certain state of things and then induces him to act on that belief, or to alter his own position, is estopped from asserting against that other person that a different state of things existed at that time (*Pickard v Sears* (1837) 6 Ad & El 469). In *Freeman v Cooke* (1848) 2 Exch 654, Parke B was of the view that estoppel would arise when the representor intended that his representation to be acted upon by the other person and that other person did in fact act on the representor's representation, the representor would then be estopped from resiling on his representation. Put differently, it means this. Where a person, by his words or conduct, has made a representation of fact with the intention, whether actual or presumed, of inducing another on the faith of that representation to alter his position to his detriment and as a result thereto that other person has been led to alter his position, the representor is subsequently estopped from denying, as against the representee, that the facts were as represented (*Hopgood v Brown* [1955] 1 All ER 550 at p 559; *Carr v London & North Western Rly Co* (1875) LR 10 CP 307; and *Smith & Anor v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154). The position is the same here. The plaintiff in the D4 suit has agreed initially to the defendants' request for consolidation. It must be emphasised that in agreeing to the defendants' request for consolidation, the plaintiff in the D4 suit has not imposed nor set any time limit for the application for consolidation to be filed. In my judgment, it is highly unconscionable and even bordering on being unethical for the plaintiff in the D4 suit to go back on its agreement with the defendants especially when

there is no prejudice whatsoever to the plaintiff in the D4 suit. It would also be germane to mention that at the time the plaintiff's solicitors issued that letter dated 10 January 2003 to the defendants' solicitors confirming that they have no objections to the defendants' request for consolidation (see exh 'LTL-4' of encl 44), the D4 suit was already at an advanced stage and ready for full trial and all the various documents as alluded to earlier and as stated in para 13 of encl 44A have already been filed — the last of which being the statement of non-agreed facts dated 12 December 2002. Yet, surprisingly, the plaintiff in the D4 suit was agreeable to having the D4 suit consolidated with the D5 suit. In the premises, it is my judgment that it is highly unconscionable on the part of the plaintiff to contend that the D4 suit should not be consolidated with the D5 suit on the ground that the D4 suit has already reached an advanced stage.

[16] The fact that the D4 suit and the D5 suit are at different stages should not be a bar to having the D4 suit to be consolidated with the D5 suit because after the consolidation and the transfer to the D5 court, the learned judge of the D5 court would be in a better position to determine the manner in which both the suits are to proceed during the case management. It is not the question of whether it is practical or convenient to have both these two suits to be heard at the same time. Rather the real danger in there being an anomaly of justice where the two courts in the same jurisdiction, in the same division and in the same building would arrive at different decisions based on common questions of law and facts. No two judges are the same. It has already happened at the level of the learned senior assistant registrar where the defendants' application to strike out the plaintiff's claim in the D4 suit was granted while in the D5 suit it was rejected.

[17] Now, in regard to the appeal to the judge in chambers in the D4 suit that is still pending, it is in every sense of the word a subsisting suit and it is well within the defendants' legal right in the D4 suit to file the present application for consolidation in encl 43. There is certainly no abuse of the process of this court nor is there any mala fide in filing the application in encl 43.

[18] For all these reasons, I allow the prayers as sought for in encl 43. This suit is forthwith consolidated with the D5 suit and transferred to the D5 court.

Prayers sought in encl 43 allowed.

Reported by Chew Phye Ken